which in the mind of the Registrar would not probably come to the knowledge of the defendant the Registrar would in most probability refuse to order substituted service. Thus the mode of the substituted service becomes an important factor in the approval of a substituted service application.

The learned author of **Mallal's Supreme Court Practice** 2nd Edn. at paragraphs 62/5/2 on page 851 quotes Roner LJ in *Deverall v. Grant Advertising* [1955] Ch. III;

> The intention which underlines all procedure with regard to substituted service is that the defendant will probably get to hear of the proceedings.

So even when an order for substituted service has been made the judgment can be set aside when it is disclosed that the defendant is not aware of the proceedings and was not avoiding service. Therefore in the application for substituted service it becomes all important to mention the mode of such service, and failure to do so, in my mind, would render the default judgment obtained as being irregular. Where proceedings are taken in the absence of one party it is most important that there should be strict compliance with the rules. (See *P.T. Pelajaran Nasional Indonesia v. Joo Seang & Co. Ltd.* [1958] 24 MLJ 113 following the decision in *Hampa-Adams v. Hall* [1911] 2 KB 942.

From my perusal of the affidavit in support of the application for substituted service I must agree with the submission of learned Counsel for appellant that no mention is made of the mode of the proposed substituted service and hence the learned Senior Assistant Registrar ought not to have ordered substituted service. I therefore find that the default judgment obtained against the appellant to be an irregular judgment and consequently the appellant is entitled to have it set aside *ex debitio justitiae*. In view of this finding I feel there is no need for me to go into the merits and the appeal by the 9th. defendant is hereby allowed with costs, and the default judgment is set aside.

CHIN HWA ENGINEERING DEVELOPMENT CO.

v.

THE STATE GOVERNMENT OF SARAWAK

HIGH COURT, KUCHING
DATO' HJ. ABDUL KADIR BIN SULAIMAN J.
[ORIGINATING SUMMONS NO. KG. 269 OF 1992 (II)]
28 JUNE 1993

ARBITRATION: Dispute referred to arbitration - Arbitrator making award in favour of plaintiff - Defendant not taking any steps to set aside award or to have award declared as not binding for want of jurisdiction - Section 24(2) Arbitration Act 1952 - Order 69 Rules of the High Court 1980 - Application for leave to enforce award of arbitrator - Whether award final and binding - Whether invalidity of award could be raised in present application - Whether defendant precluded from raising the issue of validity of the award.

The plaintiff applied, pursuant to the provisions of s. 27 of the Arbitration Act 1952 (the Act), for an order that the plaintiff may have leave to enforce the award of the arbitrator, which arose out of the dispute referred to the arbitrator by the plaintiff and defendant pursuant to the terms of the contract between the plaintiff and the defendant, in the same manner as a judgment or order to the same effect.

The defendant did not take any steps to have the award set aside or to have it declared as not binding on the defendant for want of jurisdiction pursuant to O. 69 of the Rules of the High Court 1980 (RHC 1980). The defendant in opposing the plaintiff's application contended that inspite of the fact that no steps were taken to set aside the award they were not precluded from raising the issue in the present application.

Held:

[1] Once an award has been made and the time limit for challenging it has expired, the award becomes irrevocably final and binding and it can therefore be entered as a judgment and enforced accordingly.

[2] To allow the defendant to raise the question of jurisdiction of the arbitrator in the present application would be to fly in the face of the

provisions of O. 69 RHC 1980 and as the award was final and binding on the parties the defendant was precluded from raising the issue in these proceedings.

[3] Since the defendant had failed to honour the award made by the arbitrator it was proper for the plaintiff to institute this proceeding for leave to enforce the award.

[Leave granted to plaintiff to enforce the award in the same manner as a judgment or order to the same effect].

Cases referred to:
Mohamed Abdullah Tpe Abdul Majeed v. Habib Mohamed [1986] 1 MLJ 526 ***(dist)***
Middlemiss & Gould v. Hartlepool Corporation [1973] 1 All ER 172 ***(foll)***

Legislation referred to:
Arbitration Act 1952, ss. 17, 24(2), 27
Rules of the High Court 1980, O. 69 rr. 2(3), 4(1)

For the plaintiff - Mathew Chan (Margaret Loy with him); M/s. T.K. Chan & Co.
For the defendant - J.C. Fong (Bernard Philip with him); AG's Chambers

JUDGMENT

Hj. Abdul Kadir bin Sulaiman J:
This is an application by the plaintiff for an order pursuant to the provisions of s. 27 of the Arbitration Act 1952 ("the Act") that the plaintiff may have leave to enforce the award of the arbitrator dated 29 May 1992 in the same manner as a judgment or order to the same effect. The award arose out of the decision in the dispute referred to the arbitrator by the plaintiff and the defendant pursuant to clause 43 of the General Conditions of Contract contained in their contract agreement.

The clause provides *inter alia* that any dispute or difference between them "as to the construction of this contract or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith" shall be referred to arbitration and the award of such arbitrator shall be final and binding on the parties, in accordance with and subject to the provisions of the Act. The dispute arose following the issue of a letter dated 18 March 1986 by the defendant to the plaintiff suspending the plaintiff "from future tendering until further notice" during the course of construction of the works by the plaintiff arising out of the contract.

The background to this is this. The plaintiff took possession of the site in the contract in early December 1985, and piling works began at the end of the month. During the course of construction of the works, disputes arose between the plaintiff and the defendant over the size of the bakau piles specified in the contract which were not provided by the plaintiff. This led to the defendant issuing the letter abovementioned. Treating the defendant as having committed a breach of the contract and evincing an intention not to continue with the contract, the plaintiff abandoned the site on 27 March 1986.

On 24 January 1990 the plaintiff gave notice to the defendant to refer the dispute between them to arbitration pursuant to the provisions contained in the aforesaid Clause 43 of the General Conditions of Contract for the alleged repudiation of the contract by the defendant. Both parties agreed on an arbitrator in the person of Mr. Lai Peng Seng, a senior practising Advocate to arbitrate in the matter. In the end an award was handed down to the following effect in favour of the plaintiff:

(1) Damages for breach of contract and or repudiation pursuant to paragraph 29 of the points of claim in the sum of RM136,306.90;
(2) Special damages for breach of contracts pursuant to paragraph 31 of the points of claim in the sum of RM32,343;
(3) General damages for wrongful suspension of its tender registration pursuant to paragraph 32 of the points of claim in the sum of RM552,584;
(4) Interest on (1) and (2) at the rate of 8% p.a. from date of the plaintiff's reference to arbitration that is 24 January 1990 till final payment and on (3) at the same rate from 25 April 1990 till full payment; and
(5) Costs of the award (including arbitrator's fee, expenses, hiring room for the hearing) and costs of reference (including costs properly incurred by the plaintiff in the course of the arbitration).

As regards item (5) above, according to the plaintiff both parties mutually agreed on a global sum of RM70,400 as costs of both the

award and the reference. This is based on exhibits "VNH 5", a letter from the defendant dated 3 July 1992 and "VNH 6", a letter from the plaintiff dated 4 July 1992 in reply. By "VNH 7", a letter from the defendant dated 15 July 1992, the defendant informed the plaintiff that necessary steps are being taken to effect settlement of the award, However, by a letter dated 11 September 1992 from the defendant, exhibited as "VNH 8", the defendant took a sudden about-turn and informed the plaintiff that the arbitrator had exceeded his jurisdiction or acted without jurisdiction in making the award and therefore, the award is void and any action taken by the plaintiff to enforce the award will be strongly resisted. I considered the matter seriously and from the nature of the correspondence that went on between the plaintiff and the defendant, I cannot come to any other conclusion than being satisfied that there was in fact a mutual agreement between the plaintiff and the defendant over the global sum of RM70,400 as costs for the item. But for the jurisdictional issue of the arbitrator, I am satisfied that both the plaintiff and the defendant have no quarrel over the items contained in the award.

Section 24(2) of the Act allows the defendant to question the impropriety of an arbitration award. Order 69 r. 4(1) of the Rules of the High Court 1980 ("the RHC") provides that an application to the Court to set aside an award under s. 24(2) of the Act may be made at any time within 6 weeks after the award has been made and published to the parties. Order 69 r. 2(3) of the RHC allows an application be made for a declaration that an award made by an arbitrator or umpire is not binding on a party to the award on the ground that it was made without jurisdiction. However, todate no steps have been taken by the defendant to have the award set aside or to have it declared as not binding on the defendant for want of jurisdiction. As such the plaintiff contends that the award is final and binding between the parties under the provisions of clause 43 of the General Conditions of Contract and/or under section 17 of the Act which states as follows:

> 17. Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the award to be made by the arbitrator or umpire shall be final and binding on the parties and the persons claiming under them respectively.

So, by this application the plaintiff applies for the award to be enforced in the same manner as a judgment or order to the same effect. I will now deal with the effect of the award on the defendant in the light of it not being challenged by the defendant pursuant to O. 69 of the RHC either by way of having it set aside or having it declared that it was not binding on a party to the award on the ground that it was made without jurisdiction as contended by the defendant. The plaintiff says that the award is final and binding. But the defendant contends that the fact that no steps were taken to set aside the award, this issue of the invalidity of the award could still be raised during the proceeding to enforce the award. In other words the defendant cannot be precluded from raising the issue in the present application of the plaintiff notwithstanding that no action taken by the defendant pursuant to O. 69 of the RHC. In support of his proposition, the learned State Attorney-General for the defendant cited the case of *Mohamed Abdullah Tpe Abdul Majeed v. Habib Mohamed* [1986] 1 MLJ 526 where Peh Swee Chin J. (as he then was) held that the validity of an award of an arbitration can still be questioned at the stage of an application to enforce the award. This is so because, according to the learned Judge, the point of illegality affecting the validity of an award is a recognised ground for contesting the application for leave to enforce such an award. Even if it were not pleaded before the arbitrator or the High Court it would be the duty of the Court to take a point of illegality even if the parties before it may not take it when this point clearly arises on the evidence. In that case, both the plaintiff and defendant became partners of a restaurant by a written agreement allowing each of the parties to have exclusive management and control of the restaurant in alternate years and be entitled to keep for himself exclusively the profits and be liable for any loss of the said restaurant while under his exclusive control and management. The partnership business was on land held under a temporary occupation licence (TOL) and carried on under a stall licence. Both these licences were personal to the defendant and non-transferable. For some reason, the

defendant failed to keep to the partnership agreement and refused to hand over the said business to the plaintiff in accordance with the agreement. Pursuant to the arbitration clause in the agreement the dispute was referred to the arbitrator. The arbitrator delivered his award vindicating the rights of the plaintiff under the agreement. The defendant applied to Court to have the award set aside. The motion was heard and dismissed wherein the defendant filed a further appeal to the then Federal Court. However, the appeal was not proceeded with. The plaintiff sought leave of the Court to enforce the award of the arbitrator under s. 27 of the Act. In this proceedings before the learned Judge, the submission for the defendant was that the partnership agreement was unenforceable for having been tainted with illegality owing to non-transferability of the TOL and the stall licence. Having gone through the issue in the trial, the learned Judge however, was of the opinion that the substance of the partnership agreement did not amount to a transfer of such rights under the TOL or the stall licence but would merely amount to permission for use of such rights under both licences and he accordingly could not accept the submission of learned Counsel for the defendant on this point of illegality. So, in that case, I would support the view of the learned Judge on the issue of illegality being allowed to be raised during the application for the enforcement of the award because if the defendant succeeded in his argument, it makes the contract *void ab initio* and if it were so, then the arbitration clause contained therein cannot operate for the clause itself also is void which is based on a void contract. But in our present case, the situation is entirely different. The contract between the plaintiff and defendant is not in dispute. The contract is therefore valid and enforceable. As the contract is valid, the arbitration clause contained therein is similarly valid. So the issue of illegality in our present case does not arise. To that extent the case cited by the learned Counsel for the defendant is clearly distinguishable from the present case. Therefore, in my view, to raise the question of jurisdiction of the arbitrator in this present proceedings by the plaintiff when the defendant had slept over its right under the RHC would be to fly in the face of the provisions of O. 69 of the RHC. In the result, I am of the view that the award as it stand is final and binding on the parties and the defendant is precluded from raising the issue in this proceedings. I find support in *Middlemiss & Gould v. Hartlepool Corporation* [1973] 1 All ER 172, where the Court of Appeal of England laid down the rule that once an award has been made and the time limit for challenging it has expired, the award becomes irrevocably final and binding and it can therefore, be entered as a judgment and enforced accordingly. Lord Denning in that case stated that the summary method, which is *pari materia* with our s. 27 of the Act, is to be used in nearly all cases and leave should be given to enforce the award as a judgment unless there is real ground for doubting the validity of the award. So, the mere fact that there was a point of law which one side or the other thought had been wrongly decided did not make the award invalid. In this case I find that there is no real ground for doubting the validity of the award. Clause 43 of the General Conditions of Contract talks of any dispute or difference as to any matter or thing of whatsoever nature arising under the contract or in connection with the contract is the subject of arbitration proceedings. Therefore, suspending the plaintiff "from future tendering until further notice" resulting in the plaintiff being unable to procure contracts from March 1986 to April 1990 as found by the arbitrator is a dispute over matters in connection with the contract entered into between the plaintiff and the defendant. The award being final and binding on the parties, it is for the defendant to honour it. Since the defendant had failed to do so, it is proper for the plaintiff to institute this proceeding for leave to enforce it.

Having so held, it is no longer necessary for me to determine whether or not the arbitrator has jurisdiction or lacked jurisdiction to decide on the dispute and to hand down the award as he did in this case. In the circumstances, leave is hereby granted to the plaintiff to enforce the said award in the same manner as a judgment or order to the same effect. The defendant is hereby ordered to pay to the plaintiff:

(1) Damages for breach of contract and or repudiation pursuant to paragraph 29 of the points of claim in the sum of RM136,306.90;

(2) Special damages for breach of contracts pursuant to paragraph 31 of the points of claim in the sum of RM32,343;
(3) General damages for wrongful suspension of its tender registration pursuant to paragraph 32 of the points of claim in the sum of RM552,584;
(4) Interest on (1) and (2) at the rate of 8% p.a. from date of the plaintiff's reference to arbitration that is 24 January 1990 till final payment and on (3) at the same rate from 25 April 1990 till full payment;
(5) Costs of the award (including arbitrator's fee, expenses, hiring room for the hearing) and costs of reference (including costs properly incurred by the plaintiff in the course of the arbitration) in the sum of RM70,400; and
(6) Costs of this application to be taxed, unless agreed.

KUPPUSAMY A/L BERAPPAN

v.

SELVANAYAGI A/L FERNANDO & ANOR.

HIGH COURT, SHAH ALAM
TUAN AZMEL HJ. MAAMOR JC
[CIVIL SUIT NO. 22-477-1992]
12 MARCH 1993

RENT CONTROL: Defendants owners of premises - Defendants obtaining order of Rent Tribunal for plaintiff/tenant to vacate premises - Plaintiff obtaining ex-parte injunction restraining defendants - Application to set aside injunction - Whether defendants entitled to resort to Rent Tribunal to obtain redress - Whether decision of Rent Tribunal unenforceable - Section 7(2) Specific Relief Act 1950.

The plaintiff was the tenant of rent controlled premises of which the defendants are the landowners. The defendants intended to effect development on the area where the premises were situated and applied to the Rent Tribunal which ordered the plaintiff to vacate the premises. The plaintiff obtained an ex-parte injunction to restrain the defendants from trespassing, damaging and destroying the plaintiff's residence and goods and the defendants applied to set aside the injunction.

The plaintiff objected to the application on the grounds that there was a suit pending in the Sessions Court between the parties on the same subject matter and as such the defendants should procced with this case instead of resorting to the Rent Tribunal to obtain redress.

The plaintiff further contended that by virtue of the provision of s. 7(2) of the Specific Relief Act 1950 the decision of the Rent Tribunal was unenforceable as it did not come within the meaning "proceedings in court".

Held:

[1] The proceedings in the Sessions Court in which the defendants sued the plaintiff for non-payment of rental and the plaintiff counterclaimed for damages could not serve as a bar against the defendants referring the matter to the Rent Tribunal under the provisions of the Control of Rent Act 1966. The claim by the defendants and the counterclaim by the plaintiff in the Sessions Court could be heard by that Court as and when that Court was ready to hear the case.